Filed 1/14/19 Marriage of McKinley CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of CATHERINE and RUSSELL MCKINLEY.	
CATHERINE MCKINLEY, Respondent, v. RUSSELL MCKINLEY, Appellant.	E068068 (Super.Ct.No. SICVFL1456769) OPINION

APPEAL from the Superior Court of Inyo County. Brian Lamb, Judge. Affirmed.

Wood Law Group, Frederick G. Wood, Christopher R. Wood and Gian Carlo Simonetti for Appellant.

Law Office of Victoria L. Campbell and Victoria L. Campbell for Respondent.

On December 21, 2015, the family court ordered the dissolution of the marriage of Catherine McKinley[1] (Wife) and Russell McKinley (Husband). In June 2015, temporary spousal support and child support were set at zero dollars. On December 21, Wife and Husband entered into a marriage settlement agreement (the Agreement), which reflected the temporary June 2015 support orders "shall continue in full force and effect." The family court ordered spousal and child support per the Agreement, i.e., zero dollars. In May 2016, Husband requested a modification of the spousal support order. Husband requested $1,000 per month in spousal support. The family court denied Husband's request.

Husband raises three issues on appeal. First, Husband contends the family court erred by concluding Family Code section 4326[2] did not apply. Second, Husband asserts the family court erred by finding that, at the time of executing the Agreement, it was reasonably within the expectations of Husband and Wife that their minor child would attain the age of majority and graduate high school. Third, Husband asserts the family court erred by not applying the factors set forth in section 4320. We affirm the judgment.

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[1] Catherine McKinley is now known as Catherine Chuey.

[2] All subsequent statutory references will be to the Family Code unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

A. BACKGROUND

Husband and Wife married in September 1988. Husband and Wife separated in April 2014. Husband and Wife had five children, including three daughters: Shelby, Cassie, and Carlie. In December 2015, only one child was still a minor—Shelby, who was 17 years old. Shelby was born in March 1998. Shelby had her own son, who was born in November 2014. Shelby continued to attend high school. Husband worked as a pastor at Calvary Baptist Church. Wife worked as a registered nurse at a hospital.

B. 2015 TEMPORARY SUPPORT ORDER

After Husband and Wife separated, Shelby and her son resided with Wife in a travel trailer at an RV park. Wife was employed in a night shift supervisorial management position at a hospital. On December 2, 2014, Wife took a disability leave of absence from her job due to stress caused by "the fact that her night supervisorial position made her responsible for operations of the entire hospital."

On January 26, 2015, Wife returned to work "as a regular staff nurse, which resulted in an approximately $46,000 per year reduction in pay." Wife's staff nurse position resulted in an average monthly gross income of $8,367.13, and an average monthly net income of $4,149.19. In February 2015, Wife was ordered to pay Husband $1,018 per month in temporary spousal support. That amount included a $555 offset for the child support that Husband would have needed to pay to Wife for Shelby.

Husband continued to reside in the family residence with their 19-year-old daughter, Cassie. Cassie was working part time, but was not contributing to Husband's

expenses. Husband's monthly gross income was approximately $4,171 of which approximately half was non-taxable. In April 2015, Wife requested the family court modify the temporary spousal support and child support to zero. The family court found Wife "incurred a substantial reduction in income." In June 2015, the court ordered temporary spousal support and child support be set at zero.

C. THE AGREEMENT

In December 2015, Husband and Wife entered into the Agreement. It reflected that Husband continued to be employed as a pastor by Calvary Baptist Church, and Wife continued to be employed as a hospital nurse. The Agreement also provided that Husband and Wife had one minor child, Shelby, who was 17 years old, and who was born in March 1998.

The Agreement provided for joint legal custody of Shelby. Wife had primary physical custody of Shelby, and Husband had the right of reasonable visitation. The Agreement reflected that on June 2, 2015, the family court ordered spousal and child support in the amount of zero dollars. The Agreement provided that the June 2, 2015 "orders shall continue in full force and effect."

Despite the child support order, Husband and Wife agreed to each be responsible for half of Shelby's medical and dental expenses, in excess of her insurance coverage. In regard to Shelby's medical expenses, the Agreement provided, in part, "If the minor child[] may be covered beyond the age of 19 as a dependent under either of the parties' health care plans through their employment, such party or parties shall continue coverage so long as coverage is available."

In regard to spousal support, the Agreement provided, "The Court shall continue to reserve jurisdiction over spousal support. For purposes of any post-judgment request for order to modify spousal support, the Court shall consider as a factor, in addition to the provisions of Family Code § 4320, any and all contributions and/or other support provided to and/or on behalf of the parties' adult children, under the age of 26, for higher education."

On December 21, 2015, the family court entered an order for the dissolution of Husband and Wife's marriage. The Agreement was attached to the family court's order of dissolution. The family court ordered that the child and spousal support directives set forth in the Agreement were the orders of the court.

D. REQUEST FOR MODIFICATION

On May 31, 2016, Husband requested a modification in the amount of spousal support. Husband requested Wife pay $1,000 per month in spousal support. Husband asserted that Wife remarried, and Wife's new husband was also a registered nurse. Husband believed that Wife and her new husband had a joint income in excess of $200,000 per year.

Husband asserted he depleted his savings. Husband lost his health insurance when he divorced Wife, because the insurance had been provided through Wife's employer. Husband continued to reside in the family residence, which he shared with daughters Cassie (20 years old) and Carlie (26 years old). Husband had the house listed for sale months prior, but he had not yet been able to sell it, and there was "virtually no equity in it." Cassie and Carlie helped to pay the 2015 property taxes for the residence

because Husband could not afford the taxes by himself. Husband asserted that since December 2015, Shelby reached the age of 18 years old and completed high school. Husband contended that Shelby becoming 18 years old was a material change in circumstance. Husband concluded that his standard of living had decreased, while Wife's standard of living had increased.

Husband asserted his gross income was $4,132 per month, and his expenses were $5,107 per month. Cassie and Carlie contributed approximately $200 total per month to Husband's expenses.

E. RESPONSE

Wife responded to Husband's request to modify spousal support. Wife did not consent to Husband's request. Wife declared that during the first 10 years of their marriage she stayed home with the children, while Husband worked as a union operating engineer. Wife asserted that Husband continued to pay his union dues while working as a pastor. Wife declared that an operating engineer can be away from the profession "for a long period of time and still . . . return with some on-the-job orientation to the same level that [he] left." Wife asserted union jobs were available in the Bishop area, where they lived, and they included "great benefits."

Wife asserted that Husband's salary as a pastor was sufficient to maintain the lifestyle they had during their marriage, which was a fiscally conservative standard of living. Wife asserted that, if Husband needed more money, then he could return to working as a union operating engineer. Wife contended paying spousal support would

be a hardship for her because she was supporting Shelby, who was in college, as well as Shelby's son.

Wife asserted her gross income was $7,703 per month. Wife asserted that she planned to move to Alaska in June 2016 to start a new job. Wife listed her monthly expenses as $8,500. Wife did not include her new husband's monthly income, but asserted he paid $4,000 of her monthly expenses.

F. REPLY

Husband replied to Wife's response. Husband contended it had been 15 years since he worked as a heavy equipment operator. Husband asserted it was "unrealistic and inappropriate" to suggest that he return to heavy equipment work after being away from it for 15 years.

G. HEARING

On November 2, 2016, the family court held a hearing on Husband's request. Wife testified at the hearing. Wife was working as a registered nurse in Alaska. In the first three months of working in Alaska, Wife earned $27,483. Wife and her new husband purchased a house in Alaska for $360,000 with a mortgage of $360,000. Wife asserted her monthly expenses were $8,755, and her new husband paid approximately $4,000 of the monthly expenses.

Husband also testified at the hearing. Husband asserted his monthly income was $4,132, and a portion of that was non-taxable. Husband did not have health insurance. Husband was given $4,000 per year for health insurance premiums, but he used the money for household bills. Husband believed his standard of living was worse than it

was during the marriage. On cross-examination, Husband stated that there was an unfinished stairway in the yard of the family residence that has been under construction since 2015. Husband did not list the house for sale with a realtor; instead, he listed the house as for sale by owner on Zillow. Husband explained that there was not enough equity in the home for a realtor to accept the listing. The "for sale" sign in front of the house fell in a windstorm and Husband had not replaced it.

In closing argument, Husband asserted Shelby reaching age 18 was a material change that had occurred since the spousal support order was entered. The family court asked if Shelby turning 18 and graduating high school was foreseeable at the time of the Agreement, such that the parties could have accounted for that change when entering into the Agreement. Husband asserted a modification of support was anticipated as shown by the portion of the Agreement that requires taking college expenses into consideration when ruling on any request for modification.

Husband further asserted that Wife was earning more money in Alaska. Husband contended that Wife was earning approximately $9,000 per month, and her expenses were approximately $4,700 per month. Husband contended Wife should pay $1,035 per month in spousal support. The family court asked why Wife should pay spousal support when Husband was living in a three bedroom, two and a half bath house. The court said, "That's a big house for one person, okay?" Husband explained that "the marital standard of living was this residence," and that two of the couple's children were living in the residence and contributing $500 per month to the expenses.

Wife contended that a material change in circumstance had not been proven. Wife asserted that, at the time of the Agreement, the parties contemplated that Shelby would turn 18 and graduate high school. Wife argued that Husband had an obligation to become self-supporting, and that he failed to do so. Wife contended Husband could "easily maintain" the marital standard of living if he desired. Wife argued that Husband did not require his daughters to pay $500 per month rent on a regular basis, he tithed $400 per month instead of paying for insurance, and he paid $500 per month to board horses. Wife contended Husband needed to be responsible for his expenses. The family court took the matter under submission.

H. RULING

The family court issued a written ruling. The family court found that Husband's request to modify spousal support was made less than six months after the parties entered into the Agreement. The family court found the Agreement contemplated ongoing financial support for the couple's children after they attained majority, and therefore, Shelby reaching age 18 was contemplated at the time of entering into the Agreement. Because Shelby reaching age 18 was contemplated at the time of the Agreement, a material change of circumstance was not shown by Shelby turning 18.

In regard to section 4326, the family court wrote, "[S]ection 4326, subdivision (a), provides 'the termination of child support pursuant to subdivision (a) of . . . section 3901 constitutes a change of circumstances that may be the basis for a request by either party for modification of spousal support.' However, that provision has no application here, because there was no companion child support order 'in effect' under the

[Agreement] and the judgment. The purpose of the statute was to provide the supported spouse, who presumably is the recipient of child support while the child is a minor, to seek a modification of spousal support when the child support ends because the minor ages out."

The family court concluded Wife's new marriage was not a change in circumstance because the family court cannot consider a subsequent spouse's income in calculating spousal support. Additionally, the family court found Husband failed to prove that Wife's "ability to pay spousal support had significantly increased since the December 2015 judgment." Because a material change in circumstance was not shown, the family court denied Husband's request to modify the amount of spousal support.

DISCUSSION

A. SECTION 4326

Husband contends the family court erred by concluding section 4326 was inapplicable.

We apply the abuse of discretion standard of review. (*In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1235.) "A party moving to modify or terminate spousal support has the burden to show a material change in circumstances." (*In re Marriage of Swain* (2018) 21 Cal.App.5th 830, 836.)

Section 4326, subdivision (a), provides, "[I]n a proceeding in which a spousal support order exists or in which the court has retained jurisdiction over a spousal support order, if a companion child support order is in effect, the termination of child support pursuant to subdivision (a) of Section 3901 constitutes a change of

circumstances that may be the basis for a request by either party for modification of spousal support." Section 3901, subdivision (a), provides, "The duty of support imposed by Section 3900 continues as to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting, until the time the child completes the 12th grade or attains the age of 19 years, whichever occurs first."

The family court retained jurisdiction over the spousal support order in this case. There was a child support order for zero dollars in effect. Shelby became 18 years old in March 2016 and completed high school that same year. Accordingly, the elements for section 4326 have been met: (1) the court retained jurisdiction, (2) there was a child support order, and (3) child support terminated because the child completed high school at age 18. Therefore, we conclude the family court erred by concluding section 4326 was inapplicable.

Wife contends that in June 2015 the family court ruled there would not be a child support order. In other words, Wife is asserting there was not a child support order for zero dollars; rather, Wife asserts there was no order. The December 2015 dissolution order reads, "Child support is ordered as set forth in the attached Settlement agreement, stipulation for judgment, or other written agreement." The Agreement reads, "The Court issued temporary orders June 2, 2015 in which the Court ordered that no payment of child support would be made . . . . [T]he current orders shall continue in full force and effect." The language in the dissolution order that "[c]hild support is ordered," reflects the family court ordered child support in the amount of zero dollars. Further,

the Agreement repeatedly refers to an order of child support. Accordingly, we are not persuaded by Wife's argument that the family court did not enter a child support order.

"Although the trial court may not modify spousal support without proof of a change in circumstances, the converse is not true. ' "[A] showing of changed circumstances does not necessarily mandate a modification of spousal support." ' [Citation.] ' "A trial court considering whether to modify a spousal support order considers the same criteria set forth in Family Code section 4320 as it considered in making the initial order." ' " (*In re Marriage of Minkin* (2017) 11 Cal.App.5th 939, 956.) In other words, after a showing of changed circumstances has been made, the trial court must analyze various factors to determine the amount of support that should be paid.

Husband does not raise an argument as to why the family court's error concerning changed circumstances was prejudicial. We cannot reverse a judgment unless the error resulted in prejudice, i.e., "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*In re Dakota J.* (2015) 242 Cal.App.4th 619, 630.) It is the appellant's burden to demonstrate prejudice. (*Kern County Dept. of Child Support Services v. Camacho* (2012) 209 Cal.App.4th 1028, 1036.)

The record reflects that the child support order, which was set at zero dollars, expired. Legally, that constitutes a change in circumstance. (§ 4326.) However, factually, a change from zero dollars to zero dollars appears to be of little consequence. Accordingly, because Husband has not argued that he was prejudiced by the error, and

we see little, if any, prejudice on the face of the record, we do not reverse the judgment. (*People v. Reardon* (2018) 26 Cal.App.5th 727, 741 [failure to argue prejudice forfeits the issue].)

B. REASONABLE EXPECTATIONS

Husband contends the family court erred by finding that, at the time the parties entered into the Agreement, they reasonably expected Shelby to turn 18 and graduate high school and therefore there was not a material change in circumstance. We have concluded *ante* that the family court erred in concluding a change of circumstances was not shown. Accordingly, we do not address the merits of this second argument that again asserts the family court erred in concluding a change of circumstances was not shown.

Husband does not raise a prejudice argument in relation to this second issue. Because Husband does not demonstrate why it is reasonably probable a result more favorable to Husband would have been reached absent the error, i.e., why it is reasonably probable that he would have been granted spousal support, we do not reverse the judgment. (*Kostecky v. Henry* (1980) 113 Cal.App.3d 362, 374 ["it is incumbent upon the appellant to demonstrate that the error was prejudicial under the particular facts in evidence"].)

C. SECTION 4320

Husband contends the family court "abus[ed] its discretion by not considering and applying all factors in [section] 4320." Husband contends the family court should have found a material change in circumstances, pursuant to section 4326 or due to

Wife's increased salary, and then it should have analyzed the factors set forth in section 4320. Husband contends he provided evidence to support findings in his favor on the section 4320 factors, and therefore, the family court erred by not analyzing the factors.

We held *ante* that the family court erred by concluding a change of circumstances was not shown. (§ 4326.) Because a change of circumstances was shown (§ 4326), the family court should have proceeded to an analysis of the section 4320 factors. (*In re Marriage of Minkin*, *supra*, 11 Cal.App.5th at p. 956.) The section 4320 factors include issues such as (1) "[t]he extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage," and (2) "[t]he age and health of the parties." (§ 4320, subds. (a)&(h).) The family court erred by not conducting that analysis.

Husband does not explain why it is reasonably probable that a result more favorable to him would have occurred absent the error. The child support order that expired was set at zero dollars. Therefore, in practical terms, the child support order changed from zero dollars to zero dollars. The prejudice suffered by Husband as a result of the family court not recognizing this as material change is not obvious. Husband needs to explain why it is reasonably probable that if the family court had analyzed the section 4320 factors, then he would have been granted spousal support. Due to Husband's failure to argue the issue of prejudice, we do not reverse the judgment. (*In re Celine R.* (2003) 31 Cal.4th 45, 59-60 ["The California Constitution prohibits a court from setting aside a judgment unless the error has resulted in a 'miscarriage of justice' "].)

DISPOSITION

The judgment is affirmed. Respondent is awarded her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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MILLER
Acting P. J.

We concur:

SLOUGH
J.

RAPHAEL
J.